

**IN THE COURT OF ABDUL BASIT,
ADDITIONAL DISTRICT JUDGE-II, ORAKZAI**

Civil Misc. Appeal No. 08/14 of 2023

Date of institution: 15.06.2023

Date of decision: 14.02.2024

Date of consignment:

Omar Siddique son of Ghulam Siddique resident of Quom Biland Khel, Tehsil Ismail Zai, District Orakzai and three others (petitioners/defendants no. 1-4)


Versus

Muhammad Jameel son of Hashim Khan resident of Quom Biland Khel, Tehsil Ismail Zai, District Orakzai and 16 others (respondents no. 1-5/ plaintiffs and respondents no. 6-17/defendants no. 5-16)

JUDGMENT

Through this judgment I shall decide civil miscellaneous appeal filed by appellants against respondents under section 104 of The Civil Procedure Code, 1908 challenging therein the judgment and order dated: 30.05.2023 of the Court of learned Civil Judge-I, Orakzai passed in civil suit no. 07/01 of 2022, whereby, he has permitted respondents no. 1-5 to represent the co-sharers of the suit property in a representative capacity.

Succinct facts of the case as per amended plaint are that respondents no. 1-5/plaintiffs were recorded co-sharers in possession of a joint holding (*shamilat*) measuring around 100 jarib area bounded from east houses Gul Mad Khan etc. & Mandrat Village, west houses of Syed Kareem & Algada etc., and south Garbawa Algada situated in moza Biland Khel, Orakzai, the suit property; that there is a written document drafted by the elders of locality about fact that suit property was joint and un-partitioned, wherein, no one can raise the constructions, make illegal interference or forcible possession etc. until its regular partition; that since respondents no. 1-5/ plaintiffs were not only the co-sharers in the suit property but also the


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elders of Tappa Jat (tribes); therefore, they had filed a separate application along by annexing a detailed lists of co-sharers of each tribe for seeking permission of the court to file the suit in hands in a representative capacity; that suit property is barren and no constructions had been made in it except the mosque etc.; that suit property is also not in possession of any person; however, now the appellants and respondents no. 6-17 intend to make forcible possession over an area of 30 kanal in order to drove over the tractor to plain the suit property, which is against the law, against the written deed and invasion upon the rights of other co-sharers; therefore, respondents no. 1-5 have prayed for decree to declare that suit property is joint holding of the co-sharers and the act of appellants and respondents no. 6-17 is against the law and inoperative upon their rights; that they have also prayed for decree of possession through partition of suit property as per their shares on demolishing of the constructions, if made any during pendency of the suit; that they have finally prayed for decree of permanent and mandatory injunctions to restrain the appellants and respondents no. 6-17 from raising constructions, making any sort of interference, changing nature etc. of the suit property.

Appellants and respondents no. 6-17 were summoned by learned trial court, who attended the court and filed respective written statements and written replies. They have also resisted the application of respondents no. 1-5, whereby, the latter sought permission to be nominated as the representative of other co-sharers. Learned trial court heard the arguments and decided the application filed under Order I Rule 8 CPC in favor of respondents no. 1-5, who were permitted to represent the co-sharers named

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in the lists through order dated 30.05.2023 and in this respect also passed direction for publication of notice in daily newspaper "Ausaf".

Appellants feeling aggrieved impugned herein the order of learned trial court dated 30.05.2023 by alleging it as wrong, illegal, against the law, facts and untenable in the eyes of law. They alleged that learned trial court has committed grave illegality and material irregularity in exercise of jurisdiction vested in it. They alleged that order is the result of misreading, non-reading of material available on file & based on improper appreciation of record. They further contended that respondents no. 1-5 were neither the representatives of the other co-sharers nor they had submitted a proper list. That further added that a suit for declaration and possession cannot be filed in respect of a joint holding; therefore, prayed that on acceptance of instant appeal, judgment & order of the learned trial court dated 30.05.2023 may be set-aside.

The learned counsel for respondents no. 1-5 resisted the arguments and alleged that since learned trial court has already permitted them to file suit in a representative capacity; therefore, order of learned trial court is based on just findings and appeal is not tenable, which may be dismissed.

Arguments heard and record perused.

Before dilating on merits, I would like to mention that impugned order was a revisable in nature but the appellants have assailed the same by instituting a miscellaneous appeal, which is not tenable, but since prime purpose and paramount consideration of legal proceedings is to do justice between parties; therefore, one type of proceedings can conveniently be converted into another type of proceedings in order to avoid multiplicity of proceedings or failure of justice, thus, the miscellaneous appeal in hands is

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converted into civil revision *the wisdom is drawn from case law reported in PLD 2015 Baluchistan 135)*

In the wake of arguments advanced by learned counsel for parties and record before the court, it is held that petitioners and respondents no. 1-5 concede that the suit property is a joint holding and there are numerous co-sharers in it; whereas, respondents no. 6-17 not only denied the status of joint holding but contended the suit property to be their ownership, which they allege to consists of more area than mentioned in the plaint. Since, it is a case of respondents no. 1-5, who alleged the suit property to be a joint holding, which is allegedly the co-ownership of parties at dispute and the other co-sharers; therefore, they had filed the application under Order I Rule 8 CPC for permission to file the suit in a representative capacity, which was allowed and proclamation was made; therefore, my findings shall revolve around this point only.

Before dilating upon merits of case, I would like to reproduce Rule 8 of Order I of The Civil Procedure Code, 1908, which reads as follow;

8. One person may sue or defend on behalf of all in same interest.

(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiffs expense, notice of the institution of the suit for all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

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(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

The bare reading of above rule provides a basic principle, according to which following conditions must be fulfilled in order to institute a representative suit, which are as below;

- i. Persons interested in the suit must be numerous
- ii. They all must have the same interest in the suit
- iii. Permission of the Court under rule 8 shall be obtained
- iv. Notice must be given to all the persons, whom it sought to represent and
- v. Indian Supreme Court while interpreting this provision laid down that "to enable a person to file a suit in a representative capacity for and on behalf of numerous persons, where they have the same interest, the only condition is the permission of the Court". The reliance is placed on case law reported in "2019 CLC 1992" [Peshawar (Mingora Bench)].

Undoubtedly, the list annexed with the plaint suggests there are numerous persons, which respondents no. 1-5 allege to have same interest in the suit property along with them and in this respect they had also filed an application under Order 1 Rule 8 CPC, whereby, the learned trial court has grant them permission to file the suit in a representative capacity and in this respect, the co-sharers having same interest in the suit property had also been informed through publication in the newspaper, which all facts apparently provide that all the conditions mentioned in the above referred provision of law have been complied with.

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Petitioners, however, objected that there are numerous co-sharers/ persons in the suit property & lists of co-sharers submitted by respondents no. 1-5 is deficient, incomplete, unauthentic, unverified and unsigned; therefore, it cannot be relied, which seems to be quite genuine objection because the respondents no. 1-5 have annexed around three lists each containing different numbers of persons in it, however, not a single list is signed by them nor verified from tehsildar or by elders of locality. Besides, admittedly, there is no land revenue record in district Orakzai, whereas, these lists only contain the names of male members having not a single name of a female inhabitant, which is unbelievable because on death of the male members, their legacy automatically devolves to their survivors, thus, names of females should have been mentioned accordingly. It was also objected by learned counsel for petitioners that when a party claims the possession through partition, then, each and every party is to be arrayed as plaintiff or defendant in personal capacity so that he may also reap the fruit, which is also quite genuine objection; therefore, respondents no. 1-5 were supposed to array all the co-sharers as plaintiffs in the suit and those, who did not want to join them as plaintiffs, they should have been arrayed as defendants in the suit so that ends of justice should have been achieved. More so, although respondents no. 1-5 have given the boundaries of the suit property in heading of the plaint but the detail of those boundaries is insufficient having no detail as to what is located on north of the suit property, which will ultimately cause great inconvenience to the executing court, in case a decree is passed. Likewise, though respondents no. 1-5 have sued in a representative capacity but their plaint is silent about the actual existing interest of the parties in the subject matter nor did they

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mention that what steps they had taken, if any, to enable them to file the suit in hands in such a character because Order VII Rule 4 explicitly provides that "where the plaintiff sues in representative character, the plaint shall show not only has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it".

In view of my above findings, it is held that although respondents no. 1-5 have been permitted by the learned trial court to file the suit in hands in a representative capacity, however, for the reasons noted above, the permission seems to have been granted in haste and without resorting to all legal requirements, which provides that the learned trial court has not exercised the powers vested in it; therefore, instant civil revision petition is allowed, the judgment and order dated 30.05.2023 of the learned trial court is set-aside.

The respondents no. 1-5 if want partition of the suit property by metes and bound, then, they are at liberty to submit an amended plaint, wherein, not only array all the necessary parties by names, including female inhabitants in their personal capacity, either arraying them in the panel of plaintiffs or defendants, as the case may be, and also provide complete particulars/boundaries of the suit property.

If respondents no. 1-5 wish to sue petitioners in a representative capacity without seeking any partition, then, they are directed to submit an amended plaint by providing full particulars/boundaries of suit property and also submit a detailed lists of co-sharers of the suit property having same interest in the subject matter, including names of females inhabitants, who are recorded co-sharers in it, and that lists must contain the addresses

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of co-sharers duly attested/verified by Tehsildar/respectable elders of the locality and signed by respondents no. 1-5/plaintiffs, where after, the learned trial court shall proceed in accordance with law afresh.

Parties have to bear costs of their proceedings since none of them have specifically proved the costs on litigation etc.

Copy of this order be placed on record of learned trial court, where after, the requisitioned record, if any, be returned and file of this court consigned to record room after necessary completion and compilation.



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CERTIFICATE

Certified that this judgment consists of eight (08) pages, those are signed by me after necessary corrections.



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